RECORD AND BRIEFS

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No. 15-1359

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., PETITIONERS

v.

IBRAHIM TURKMEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals held that the former Attorney General of the United States and the former Director of the Federal Bureau of Investigation (FBI) may be subjected to discovery, other demands of further litigation, and potential liability for compensatory and punitive damages in their individual capacities for unintended consequences arising from the implementation of policy decisions they made 15 years ago during an unprecedented national-security crisis. As six members of the court below recognized, that decision "raises questions of exceptional importance meriting further review," departs from this Court's decisions in three separate areas of the law, and puts the Second Circuit "at odds" with several other circuits. Pet. App. 241a, 242a-243a, 249a (joint dissent from denial of rehearing). Several other former Attorneys General and FBI Directors agree. See Amicus Brief of William Barr et al.

In addition to defending the decision below on the merits, respondents[1] contend that the Court "should not decide this case at an early stage of proceedings without a nine-Justice Court." Br. in Opp. 34 (capitalization modified). Waiting for this case to proceed to summary judgment or trial, however, would not alter the recusal possibility that respondents identify. *Id.* at 36 n.15. And all three questions presented in the petition are threshold issues most appropriately resolved at the motion-to-dismiss stage. Indeed, the Court has "repeatedly" emphasized "the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam)); see *Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'") (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). And it is especially important to do so when the officials involved are the former Attorney General and FBI Director. As it did in *Iqbal*, the Court should grant a writ of certiorari.

A. Factors That Other Circuits Would Have Considered To Be Part Of The "Context" Of This Case Counsel Against Extending The *Bivens* Remedy To Respondents' Allegations

The petition explains (at 13-19) how the court of appeals flouted this Court's repeated admonitions to

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[1] We use the term "respondents" to refer to the six plaintiffs who have challenged the conditions of their confinement at the Metropolitan Detention Center (MDC). See Pet. 2 n.1.

exercise caution before extending the judicially inferred remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), into "any new context," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). Consistent with the court of appeals' blinkered approach, respondents contend that their *Bivens* claims "arise in a familiar context" because they raise "a familiar constitutional claim based on a familiar mechanism of injury." Br. in Opp. 14, 16 (capitalization modified).

That vague, two-part calculus is neither articulated in nor consistent with this Court's decisions. See Pet. 15-16. That approach allowed the court below to disregard three salient considerations about the official actions that respondents challenge: that they were (1) high-level policy decisions that implicated both (2) national security and (3) immigration. Other courts of appeals would have treated such considerations as relevant to the determination whether respondents sought to extend the *Bivens* remedy to a new and problematic "context." Pet. 17-19 (citing cases from the Fourth, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits).

Respondents suggest (Br. in Opp. 18, 22) that this case does not actually implicate either "immigration" (because they object to "their mistreatment in custody," which they view as having "nothing to do with their immigration proceedings") or national security (because the government did not know whether they actually posed a national-security threat). Those suggestions lack merit. The policy decisions that respondents challenge were not directed toward all persons (or all immigrants) in federal custody. Instead, they applied—as reflected in the subtitle of the In-

spector General Report—to "*Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks.*"[2] The class of persons whose conditions of confinement respondents seek to challenge consisted entirely of aliens who were arrested during the government's investigation into the September 11 attacks and detained for apparent violations of U.S. immigration laws. The hold-until-cleared policy and the decision to merge two lists of such immigration detainees therefore necessarily implicated both national-security and immigration concerns.

"Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Mirmehdi* v. *United States*, 689 F.3d 975, 982 (9th Cir. 2012) (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)), cert. denied, 133 S. Ct. 2336 (2013). The existence of that comprehensive statutory regime discountenances the extension of a judicially created damages remedy that Congress has not chosen to incorporate into the immigration laws. Similarly, to the extent that the constitutional violations alleged in this case inhered in policies promulgated (or condoned) by the Attorney General, they were more likely to be amenable to judicial review under the Administrative Procedure Act, and more likely to receive scrutiny from Congress and the Inspector General (as they in fact did), than are the actions of rogue line-level officers that the *Bivens* remedy has historically been used

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[2] Office of the Inspector Gen., Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003), https://oig.justice.gov/special/0306/full.pdf (*OIG Report*).

to redress. See Pet. 18. An additional judicially created remedy permitting damages against the Attorney General personally is thus unnecessary and inappropriate.

In addition to misperceiving the significance of each of the three contextual considerations described above, respondents fail to appreciate that the three factors *taken together* make up the relevant *Bivens* "context." Respondents contend that no court of appeals has treated any one of those factors as sufficient to preclude a *Bivens* remedy, Br. in Opp. 18-24, but their divide-and-conquer approach misses the point. Other courts of appeals have repeatedly recognized that each of the three considerations alters the relevant context of the claim and may counsel against an extension of *Bivens*. See Pet. 18-19. Although no other case appears to have involved this precise confluence of factors, the decision below remains "at odds" with those of other courts of appeals. Pet. App. 243a (joint dissent from denial of rehearing). As the outlier, it warrants this Court's review.

B. Even Under The Lists-Merger Theory, There Was No Clearly Established Constitutional Or Statutory Prohibition Against Continuing Respondents' Restrictive Conditions Of Confinement Until Respondents Were Cleared Of Any Connections With Terrorism

Even assuming that respondents have adequately alleged that petitioners Ashcroft and Mueller personally condoned or endorsed a decision to merge the New York and national INS Lists of September 11 detainees, petitioners would still be entitled to qualified immunity because it was not clearly established in 2001 that respondents' continued confinement at the MDC under the hold-until-cleared policy would be

unconstitutional. See Pet. 21-24. By equating respondents with "ordinary civil detainees" or "pretrial detainee[s]" being held in "the most restrictive conditions of confinement available," Pet. App. 43a, 49a, the court of appeals made the all-too-common mistake of conducting qualified-immunity analysis at a level of generality that did not adequately account for "the situation [the defendants] confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001); see Pet. 21-22.

Respondents were not ordinary civil detainees. They had already been arrested pursuant to the September 11 investigation, placed in the MDC, and subjected to the hold-until-cleared policy before it was discovered that, for some members of the New York List, arresting officers had failed to conduct the same initial vetting that detainees on the national INS List had received. The court of appeals, moreover, recognized that respondents' violations of U.S. immigration law justified their confinement (albeit in less restrictive conditions). Pet. App. 47a, 75a. Like the court of appeals, respondents cite no decisions indicating, much less clearly establishing as of late 2001, that continuing to apply the hold-until-cleared policy to such individuals was so "arbitrary or purposeless to national security" as to be unconstitutional. *Id.* at 141a (Raggi, J., dissenting in relevant part). Instead, respondents simply assume that some unspecified quantum of "individualized suspicion" (Br. in Opp. 2, 33 (emphasis omitted)) is a necessary predicate for any unusually restrictive confinement of lawfully detained persons, despite the dissenters' citation of contrary decisions, Pet. App. 247a & n.12 (joint dissenters); *id.* at 139a-140a (Judge Raggi); see Pet. 23 n.10.

Respondents assert (Br. in Opp. 25 n.8) that the qualified-immunity arguments set forth in the petition "ignor[e] the actual allegations in" their Fourth Amended Complaint. Throughout their brief in opposition, however, respondents seek to obscure the applicable qualified-immunity analysis by ignoring the limits of the lists-merger theory of liability countenanced by the court of appeals. Citing *Korematsu* v. *United States*, 323 U.S. 214 (1944), respondents persist in characterizing themselves as the subjects of a nationwide roundup based on nothing but their religion and apparent race or national origin. See Br. in Opp. 4-6, 9, 25, 29, 30, 33. The court of appeals, however, squarely *rejected* respondents' theory that the hold-until-cleared policy was unconstitutional *ab initio*. See Pet. App. 31a (describing "the mandate's facial validity" and petitioners' "right to presume that subordinates would carry it out in a constitutional manner"); *id.* at 47a, 63a. In fact, *no* judge on either of the courts below endorsed respondents' theory of liability.

The court of appeals' more limited theory of liability —premised on the merger of the two lists—likewise falters at the second step of qualified-immunity analysis. The Inspector General's conclusion that the decision to merge the lists was "supportable" (*OIG Report* 71), and the Second Circuit's 6-6 division in response to the petitions for en banc review, refute the panel majority's conclusion that petitioners' actions violated clearly established constitutional norms. See *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011) (citing eight-judge dissent from

denial of rehearing in finding that former Attorney General Ashcroft "deserve[d] qualified immunity" for an alleged policy about detention of terrorism suspects). With respect to the alleged violation of 42 U.S.C. 1985(3), respondents do not even attempt to defend the court of appeals' qualified-immunity analysis, which erroneously conflated constitutional and statutory equal-protection rights after acknowledging that Section 1985(3)'s applicability to federal officials was *not* clearly established in 2001. See Pet. 25-26; see also *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984).

Thus, even if the special factors described in Part A, *supra*, did not counsel against extension of the *Bivens* remedy to respondents' allegations against the former Attorney General and former FBI Director, those officials would at least be entitled to qualified immunity for the constitutional and statutory claims in this case. This Court should grant review and confirm, more than 14 years after this case began, that those officials cannot be compelled to defend against the claims for money damages set forth in respondents' complaint. See Pet. 26 n.12 (citing nine cases since 2011 in which the Court has reversed court of appeals decisions and ordered that suits against individual governmental officials be dismissed on qualified-immunity grounds).

C. Respondents Have Not Plausibly Alleged That The Decision To Merge Lists Was Made Because Of, Rather Than In Spite Of, Allegedly Discriminatory Conduct Underlying Some Arrests

With respect to the third question presented, the petition explains (at 27-31) that the decision below did not faithfully apply the pleading standard required by this Court's decision in *Iqbal*. Respondents' allega-

tions depend on speculation at many critical steps and do not plausibly attribute to Attorney General Ashcroft or Director Mueller a discriminatory purpose for merging (or condoning the merger of) detainee lists. Even if those officials engaged in the conduct that respondents allege, their actions are susceptible of an "obvious" and nondiscriminatory "alternative explanation" (*Iqbal*, 556 U.S. at 682 (citation omitted)), namely "concern that absent further investigation, 'the FBI could unwittingly permit a dangerous individual to leave the United States,'" Pet. App. 19a (quoting *OIG Report* 53).

Respondents contend (Br. in Opp. 28-29) that, at the present motion-to-dismiss stage of this case, the courts below were required to accept respondents' "specific[] alleg[ations] that Respondents were not, and Petitioners *knew* that they were not, 'dangerous individual[s].'" But such "conclusory" allegations of a culpable mental state are "not entitled to be assumed true." *Iqbal*, 556 U.S. at 681. That is particularly so given the implausibility of the allegations on which respondents rely. Without further investigation, Ashcroft and Mueller could not have *known* that respondents, or any other individuals on the New York List, were not actually dangerous. The premise of the hold-until-cleared policy, and of the reasonable desire to avoid "unwittingly" releasing a dangerous person, Pet. App. 19a, was that the government did not know that a detainee could be safely released until investigation had cleared him of "potential connections to those who committed terrorist acts," *Iqbal*, 556 U.S. at 682. Although respondents allege that this uncertainty did not provide a constitutionally sufficient justification for the hold-

until-cleared policy, they cannot reasonably dispute that the uncertainty existed.

Respondents' inference that any participation by Ashcroft and Mueller in the lists-merger decision was motivated by discrimination is especially implausible because that decision merely preserved the pre-merger status quo (which, the court of appeals concluded, did not plausibly reflect unconstitutional intent on the part of Ashcroft or Mueller, Pet. App. 31a, 47a, 63a). The merger decision did not cause anyone to be transferred to "an especially restrictive form of confinement" (Br. in Opp. 28) at the MDC. To the contrary, it allowed the majority of detainees from the New York List to remain in far-less-restrictive conditions at the Passaic County Jail. See Pet. App. 130a, 152a-153a (Raggi, J., dissenting).[3]

As in *Iqbal*, the allegation that others "may have labeled [a detainee] a person 'of high interest' [to the September 11 investigation] for impermissible reasons" is not sufficient to show that Ashcroft or Mueller "purposefully housed detainees in" restrictive conditions at the MDC "due to their race, religion, or national origin." 556 U.S. at 682-683. Accordingly, respondents have still failed to identify anything indicating that "the decision to merge the lists was made *because of*, rather than in spite of, the allegedly discriminatory conduct underlying some of the original arrests." Pet. 30; cf. *Iqbal*, 556 U.S. at 676-677 (explaining that purposeful discrimination requires more than "intent as awareness of consequences," and "instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, the action's

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[3] Respondents do not challenge the court of appeals' dismissal of the claims brought by the Passaic plaintiffs. Br. in Opp. 36 n.15.

adverse effects upon an identifiable group") (citation, brackets, and internal quotation marks omitted). The conflict between this Court's decision in *Iqbal* and the decision below—decisions entered in what is for all practical purposes the same lawsuit—warrants this Court's review.

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Allowing this 14-year-old damages suit to proceed comes at a substantial cost, one that courts should be especially reluctant to impose in the context of the unprecedented investigation into the September 11 attacks. In such situations, policy-making national officeholders should not be "deterred from full use of their legal authority" (*al-Kidd*, 563 U.S. at 747 (Kennedy, J., concurring)) by the prospect of prolonged litigation and potential personal monetary liability.

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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